

TITLE 18. FRANCHISE TAX BOARD  
AMENDMENTS TO PROPOSED  
REGULATION SECTION 25136, RELATING TO  
SALES OF OTHER THAN TANGIBLE PERSONAL PROPERTY

A hearing was held on August 10, 2011, by Melissa Potter of the Franchise Tax Board Legal Division, the “hearing officer,” on proposed amendments to California Code of Regulations, title 18, section 25136 (Regulation section 25136), which was noticed in the California Regulatory Notice Register on June 17, 2011. This regulation is intended to provide guidance on assigning sales of other than tangible property where a taxpayer makes an election for the single-sales factor formula and its market based rules.

Department staff reviewed the proposed regulations and considered the comments submitted before and after the hearing. The hearing officer recommended that certain changes be made which were published in a 15-day notice on October 7, 2011. Department staff reviewed the comments received and recommended that additional changes be made which were published in a 15-day notice on October 27, 2011. On January 12, 2012, the rulemaking file was submitted to the Office of Administrative Law for approval. Subsequent to that submittal, the Office of Administrative Law noted to Department staff that there were two phrases that had not appeared in the 45-day notice text but which did appear in the first 15-day notice text, however, one without underscore and the other without underscore or explanation for its addition. As a result, to ensure that the public has had sufficient notice of these changes, a third 15-day notice and accompanying text is being published to underscore the two phrases in the two definitions and provide an explanation for one of those changes.

These nonsubstantial or sufficiently related changes (within the meaning of Govt. Code section 11346.8) recommended by the hearing officer are reflected in the attachment hereto. These amendments to the regulation are reflected by underscore. Proposed changes to Regulation 25136 are summarized below.

1. The definition for “mixed intangibles” was modified for purposes of clarity. Originally, only a general definition for that term was provided. However, it was thought that a more precise way to define a “mixed intangible” was to refer to the actual subparagraphs for marketing and manufacturing/non-marketing intangibles which provisions, when combined, created a “mixed intangible.”

(C) A “mixed intangible” includes, but is not limited to, the license of a patent, copyright, service mark, trademark, trade name, or trade secrets where the value lies both in the marketing of goods, services or other items as described in subparagraph (A) and in the manufacturing process or other non-marketing purpose as described in subparagraph (B).

2. The definition for “reasonable approximation” was modified substantially in the first 15-day notice to include all provisions and limitations in connection with reasonable approximation of sales that appeared in the body of the regulation. This was done at the

suggestion of a commentator. In the process of moving provisions and limitations from various subsections forward to the definition, the phrase “to the extent such information is available to the taxpayer” was also brought forward to the definition, but, unfortunately, was not underscored. This phrase formerly appeared in the 45-day notice text in subsections (d)(1)(B), (d)(2)(A)2, and (d)(2)(B)2). In the 15-day text published on October 7, 2011 the purpose and relocation of the phrase are discussed at page 4:

[I]n other subsections of the regulation, reasonable approximation is to be determined “in a manner that is consistent with the activities of the customer” but limited by the proviso “to the extent such information is available to the taxpayer.” This provision was intended to provide fairness to the taxpayer who may or may not have access to such information regarding its customer. However, while that language appeared throughout the regulation’s provisions regarding reasonable approximation, that language did not appear in the definition. It has been inserted into the definition and removed from individual provisions as now redundant.”

The language “to the extent such information is available to the taxpayer” which appeared in its new location in the definition in the first 15-day notice but without underscore is underscored below.

(5) "Reasonably approximated" means that, considering all sources of information other than the terms of the contract and the taxpayer's books and records kept in the normal course of business, the location of the market for the benefit of the services or the location of the use of the intangible property is determined in a manner that is consistent with the activities of the customer to the extent such information is available to the taxpayer. Reasonable approximation shall be limited to the jurisdictions or geographic areas where the customer or purchaser, at the time of purchase, will receive the benefit of the services or use of the intangible property, to the extent such information is available to the taxpayer. If population is a reasonable approximation, the population used shall be the U.S. population as determined by the most recent U.S. census data. If it can be shown by the taxpayer that the benefit of the service is being substantially received or intangible property is being materially used outside the U.S., then the populations of those other countries where the benefit of the service is being substantially received or the intangible property is being materially used shall be added to the U.S. population. Information that is specific in nature is preferred over information that is preferred over information that is general in nature.

These sufficiently related changes are being made available to the public for the 15-day period required by Government Code section 11346.8, subdivision (c), and California Code of Regulations, title 1, section 44. Written comments regarding these changes will be accepted until 5:00 p.m. on February 16, 2012. The Franchise Tax Board is sending a copy of the proposed amendments to Regulation 25136 to all individuals who requested notification of such changes, as well as those who commented in writing to the previously noticed proposed amendments to Regulation 25136.

All inquiries and written comments concerning this notice should be directed to Melissa Potter at 916-845-7831, Fax 916-843-2114, email [Melissa.Potter@ftb.ca.gov](mailto:Melissa.Potter@ftb.ca.gov) and Colleen Berwick at 916-845-3306, Fax 916-8453648, email [Colleen.Berwick@ftb.ca.gov](mailto:Colleen.Berwick@ftb.ca.gov), or by mail to the Legal Division, Attn: Colleen Berwick, P.O. Box 1720, Rancho Cordova, CA 95741-1720. The notice and proposed amendments will be made available at the Franchise Tax Board's website at <http://www.ftb.ca.gov/index.shtml>.